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No. 97-1579

In the
Supreme Court of the United States
October Term, 1997

ZENITH/KREMER WASTE SYSTEMS, INC. AND UNITED WASTE SYSTEMS, INC.,

Petitioners,

v.

WESTERN LAKE SUPERIOR SANITARY DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a municipality may, consistent with the Commerce Clause, finance waste management services provided by the municipality through a tax paid solely by the municipality's residents on waste generated solely within the municipality's boundaries.

2. Whether a municipality providing services also available in interstate commerce from the private sector may subsidize the cost of its services through a tax on a specific resident activity rather than through "general taxes" commingled in a "general fund."

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BRIEF IN OPPOSITION

Respondent Western Lake Superior Sanitary District respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Minnesota Supreme Court in this case.

STATUTORY PROVISIONS INVOLVED

In their enumeration of the statutory provisions involved in this case, Petitioners omit the ordinance and resolutions through which the Western Lake Superior Sanitary District enacted the challenged waste management fee. The ordinance and resolutions are reproduced in Respondent's Appendix. (R.A. 17-34.) Petitioners similarly provide only excerpts from section 400.08, the Minnesota statute authorizing the waste management fee, and chapter 458D, under which the Western Lake Superior Sanitary District was created and functions. Additional relevant provisions of these statutes are reproduced in Respondent's Appendix. (R.A. 1-16.)

STATEMENT OF THE CASE

Respondent submits the following additional information to supplement and correct Petitioners' statement of the case.

The Western Lake Superior Sanitary District (WLSSD) is a political subdivision of the State of Minnesota responsible for treatment and disposal of sewage and solid waste generated within its 500-square-mile territory adjoining Lake Superior in northeastern Minnesota. *See* Minn. Stat. §§ 458D.01, .05, .07 (1996); Petitioner's Appendix (App.) 3, 94; (R.A. 8-14.). WLSSD is governed by a board composed of nine members. Board members are appointed by the elected officials of municipalities within WLSSD's territory, who are

in turn elected by WLSSD residents. Minn. Stat. § 458D.03, subd. 2. (App. 95.)

WLSSD owns and operates a refuse-derived fuel processing facility (RDF Facility) in Duluth, Minnesota, that converts mixed municipal solid waste to fuel for use in WLSSD's fluid bed reactor incinerator, which incinerates the sewage sludge by-product of WLSSD's treatment of wastewater.[1] (App. 3.) Treatment of wastewater generated by WLSSD's population produces 200 wet tons of sludge per day. (Mn. App. 374.)[2] Incineration of this sludge with refuse-derived fuel generates heat energy which WLSSD converts to steam and uses to heat its plant and power certain equipment. This system conserves more than 3,000,000 gallons of fuel oil annually. (Mn. App. 373-74.)

In addition to processing sewage and solid waste, WLSSD is required by state law to provide recycling, hazardous waste, and other special waste disposal and educational programs within its boundaries. (Mn. App. 307-08; 378-81.) WLSSD provides many of these recycling and special waste programs and services at no cost to the consumer to encourage recycling and removal of hazardous waste from the municipal waste stream.[3] (Mn. App. 307, 317-18, 325, 333-35.)

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[1] Contrary to Petitioners' assertion that the incinerator "was designed to burn other fuels," the incinerator was conceived and constructed as an integrated co-disposal system designed to fuel sewage sludge incineration with municipal solid waste. (App. 58, 60.) Such systems were specifically encouraged by the 1972 amendments to the Federal Water Pollution Control Act, Pub. L. 92-500, § 201(e), 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1281(e) (1994)).

[2] The abbreviation "Mn. App." refers to the appendix in the Minnesota Supreme Court, part of the record below.

[3] Since WLSSD implemented state-mandated recycling and special waste programs, the volume of solid waste generated within its boundaries has decreased by more than 30% annually. (Mn. App. 307.)

To ensure an adequate supply of solid waste to convert to fuel for use in sewage sludge incineration, WLSSD enforced "flow control," a requirement that all waste generated within its boundaries be disposed of at its facilities, until it was found unconstitutional in a separate lawsuit brought by Petitioner Zenith/Kremer Waste Systems, Inc. (Zenith/Kremer). (App. 3.) Until March 1996, WLSSD charged a tipping fee for disposal of waste at the RDF Facility which covered not only facility operating costs and debt service for improvements, but also all costs of recycling, hazardous waste, and other special waste disposal and educational programs and services that WLSSD provided. (App. 3; Mn. App. 307-08.)

In late 1995, following Petitioners' commencement of the lawsuit challenging flow control, WLSSD sought a means of reducing the tipping fee at its RDF Facility, then $63 per ton, to a level that would attract adequate solid waste to meet its sewage sludge incineration needs without flow control.[4] Reduction of the tipping fee required finding an alternative means to fund the recycling, hazardous waste, and other environmental and educational programs and services which the tipping fee financed. (App. 4.) At that time, Petitioners' Ontonagon, Michigan landfill, 190 miles from Duluth, charged a tipping fee of $30 to $45 per ton. (App. 4; Mn. App. 306.) Other accessible out-of-state landfills offered tipping fees of less than $30 per ton. (R.A. 39.)

Pursuant to its authority under section 400.08 of the Minnesota Statutes, the WLSSD board, following notice and public hearings, enacted an ordinance imposing a waste management fee or tax on solid waste generation within

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[4] Rather than seeking to secure the facility's financial success, WLSSD sought to continue to employ one waste stream generated by its population (garbage) in the treatment of another waste stream (sewage) generated by the same population. (Mn. App. 304.)

WLSSD, to take effect March 1, 1996. (App. 5, 92-93.) The waste management fee, approximately $28.25 per ton, was assessed on all waste generators (property owners, lessees, and occupants within WLSSD) based on the volume of waste generated by each.[5] (R.A. 20 (Ordinance § 2(2)); R.A. 30-31 (Resolution 96-2).) Section 400.08 encourages basing the fee on the volume of waste generated as an incentive to recycle, because removal of recyclables from garbage prior to pickup by a generator's trash hauler reduces the waste stream that must be processed or landfilled, and reduces the volume of waste on which the generator's waste management fee would be calculated. Minn. Stat. § 400.08, subd. 5(1) (1996). (R.A. 3.) The cost of the waste management fee to the average waste generator using a 32-gallon trash receptacle was 45 cents per pickup. (Mn. App. 310.) As permitted by the statute authorizing the fee, trash haulers collected the fee from waste generators and remitted it to WLSSD, less a 4% administrative charge which the haulers retained.[6] (R.A. 3, 20-21, 32.) Waste generators without hauler service paid the fee directly to WLSSD. (R.A. 23 (Ordinance § 3(6).) Contrary to Petitioners' assertion that Zenith/Kremer "would still have to pay WLSSD's service fee" if it hauled waste to out-of-state landfills, neither Zenith/Kremer nor any other hauler was required to pay any portion of the fee, regardless of the destination of the waste. (App. 10; Mn. App. 309-10.)

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[5] WLSSD residents attending the public hearings held prior to enactment of the ordinance preferred a volume-based waste generation fee to an ad valorem property tax because they believed that a property's value bore little relation to the amount of waste generated by its occupants. (Mn. App. 603.)

[6] Although the ordinance required haulers to bill the fee to their customers, haulers incurred no liability if a customer failed to pay the bill. (R.A. 25 (Ordinance § 4(1).) Minnesota haulers also collect sales tax and Minnesota Pollution Control Agency assessments on behalf of the state. (Mn. App. 868.)

Enactment of the waste management fee ordinance enabled WLSSD to reduce the tipping fee at its RDF Facility to $39.75 per ton, because tipping fee revenue would no longer be needed to finance WLSSD's recycling, hazardous waste, and other environmental and educational programs and services, and because 25% of the solid waste management fee, or $7 per ton, would be used to offset debt service for improvements to the RDF Facility.[7] (App. 5; R.A. 33.) Both the environmental services and the RDF Facility were available to all waste generators who paid the fee, although none were required to use either the services or the RDF Facility.

The waste management fee ordinance was in effect only until December 31, 1996, when it expired by its own terms. (R.A. 28.) WLSSD did not reenact the ordinance following its expiration. In 1997, WLSSD levied an ad valorem tax on property within its boundaries to cover RDF Facility debt service and other facility expenses not covered by the RDF Facility tipping fee, as authorized by statute. *See* Minn. Stat. § 458D.15. (App. 97.) Also in 1997, WLSSD sought and obtained authority from the Minnesota legislature to assess and collect waste service charges through a line-item property tax based on occupancy rather than property values, enabling WLSSD to recoup its 1998 RDF Facility debt service and other expenses through this method rather than via an ad valorem levy or a hauler-collected generation fee. *See* Minn.

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[7] Petitioners erroneously assert that "over 60% of the waste management fees underwrite incinerator operations," claiming that the waste management fee was used as a funding source for administration, quality control and engineering costs. In fact, the only "administration" costs which were to be recovered through the waste management fee were costs for general technical support and general solid waste planning, general management expenses, finance department costs, and general laboratory, testing and related programs, none of which were directly related to the RDF Facility. (Mn. App. 382-83.)

Stat. § 458D.111 (Supp. 1997). (R.A. 16.) Petitioners have not challenged either the RDF Facility financing mechanisms or the tipping fee used by WLSSD in 1997 and 1998.[8]

Because Petitioners' landfill in Ontonagon, Michigan is 190 miles from Duluth, disposal of waste generated within WLSSD at that landfill requires a transfer station where waste can be moved from collection vehicles to long-haul trucks. (Mn. App. 388-89; R.A. 43.) In May 1996, Petitioner Zenith/Kremer applied for a special use permit from the Department of Planning and Development of the City of Superior, Wisconsin to permit the construction of a solid waste transfer station in that city, but the application was denied. (Mn. App. 839-40, 849, 852.) Petitioners' appeal of the permit denial has thus far been unsuccessful. (R.A. 35-37.)

REASONS FOR DENYING THE WRIT

There is no reason for the Court to grant review of this case. The Minnesota Supreme Court's decision is consistent with this Court's Commerce Clause decisions, including *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), and *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). This case presents no opportunity for the Court to clarify issues concerning the scope of permissible government subsidies to local private enterprise because it involves a nondiscriminatory tax used solely to fund government services.

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[8] Petitioners have conceded throughout this litigation that a subsidy to WLSSD's RDF Facility tipping fee funded by property taxes would not discriminate against interstate commerce. (Mn. App. 188.)

I. THE DECISION BELOW IS FULLY CONSISTENT WITH THE PRINCIPLES ARTICULATED IN *WEST LYNN* AND DOES NOT WARRANT REVIEW.

Petitioners claim that WLSSD's waste management fee, coupled with the reduction in its RDF Facility tipping fee which the waste management fee revenue made possible, was "functionally identical" to the milk tax and subsidy scheme this Court invalidated in *West Lynn*. On the contrary, this case is easily distinguished from *West Lynn*.

West Lynn involved a Commerce Clause challenge to a "pricing order" imposed by the State of Massachusetts on milk sold within the state. 512 U.S. at 188. The pricing order required all milk dealers to contribute to a fund based on the amount of milk they sold in Massachusetts, regardless of where the milk originated. Two-thirds of the milk sold in Massachusetts was actually produced in other states. *See id.* at 190-91 & n.5. The fund was distributed as subsidies solely to Massachusetts dairy farmers, even though their milk accounted for only one-third of milk sales in the state. *See id.* at 191. Neither the milk dealers who paid into the fund nor the out-of-state milk producers on whose milk two-thirds of the payments were based received a cent of the fund. Thus, Massachusetts dairy farmers to whom the fund was distributed enjoyed a subsidy composed principally of taxes on milk produced by their out-of-state competitors. The milk pricing order functioned like a tariff on out-of-state milk, because although a tax was imposed on all milk, its effect on Massachusetts dairy farmers was offset by the subsidy. The tax thus violated the Commerce Clause because it benefited private in-state economic interests by burdening their out-of-state competitors. *See* 512 U.S. at 194.

In contrast to the *West Lynn* pricing order, WLSSD's waste management fee/reduced tipping fee combination

extracted no payments from out-of-state interests. The waste management fee was imposed solely on residents and businesses generating waste within WLSSD, not on haulers or competing disposal sites; thus, unlike the *West Lynn* pricing order, no out-of-state interests contributed to the revenue produced by the fee.[9]

The waste management fee revenue was used primarily to fund WLSSD's environmental programs and services unrelated to the RDF Facility, as well as a portion of the debt on improvements to the RDF Facility. These environmental programs and services were available to and benefited all waste generators within WLSSD's boundaries, the same parties who paid the waste management fee. Similarly, all waste subject to the waste management fee, even waste collected by out-of-state trash haulers, was eligible for the reduced tipping fee at the RDF Facility, although no generator or hauler was required to use that facility. Additionally, use of a portion of the waste management fee to fund RDF

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[9] That WLSSD's waste management fee fell solely on local waste generators, not waste haulers or disposal sites, also distinguishes this case from *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152 (D. Conn. 1995), and *Mid-American Waste Systems, Inc. v. Fischer*, No. C-2-94-493, Slip Op. (S.D. Ohio May 31, 1994) *(Mid-American I)*, which Petitioners cite in support of their argument that WLSSD's waste management fee discriminated against interstate commerce. In *Connecticut Carting* and *Mid-American I*, the challenged ordinances imposed per-ton fees on waste *haulers* for the waste each collected, the proceeds of which were used to cover costs for the defendant municipalities' waste disposal facilities. 946 F. Supp. at 154; *Mid-American Waste Systems, Inc. v. Montgomery*, No. C2-95-866, Slip Op. at 12, 41 (S.D. Ohio Jan. 9, 1997) (*Mid-American II)* (follow-up litigation challenging waste generation fee revised after *Mid-American I*; noting that "generation" fees in both *Mid-American I* and *Mid-American II* were levied solely upon waste haulers). Thus, in both cases, the fee at issue was indeed a tax on waste disposal services, unlike WLSSD's solid waste management fee, which was paid by resident waste generators rather than waste haulers.

Facility debt service benefited all WLSSD residents regardless of whether they used the facility, because the facility converts waste to fuel for the incineration of the sewage sludge by-product of WLSSD's treatment of wastewater, which all WLSSD residents generate.

Petitioners attempt to fit the facts of this case within *West Lynn* by mischaracterizing the waste management fee as a tax on imported waste disposal services. This characterization is simply false. While all WLSSD waste generators paid a waste management fee of $28.25 per ton, only those generators actually using the RDF Facility also paid its $39.75 per ton tipping fee. Generators sending their waste out-of-state for disposal, however, paid only the $28.25 per ton waste management fee to WLSSD, and had access to tipping fees of $30 or less per ton at out-of-state landfills. (R.A. 39.) Rather than taxing waste destined for out-of-state disposal more heavily, WLSSD taxed all local waste generators evenly, regardless of the destination of their waste. Thus, rather than increasing the cost of imported waste disposal services, WLSSD's waste management fee/tipping fee combination reduced the price of waste disposal at its own RDF Facility by recovering its costs primarily related to other environmental services through a non-discriminatory tax imposed solely on its own residents. Trash haulers and out-of-state disposal facilities incurred no increase in their own collection or disposal costs, unlike the milk dealers and out-of-state dairy farmers in *West Lynn*, who paid the Massachusetts milk tax for the privilege of selling their imported product in Massachusetts. *See West Lynn*, 512 U.S. at 190. Also unlike the plaintiffs in *West Lynn*, any hauler was eligible, but not required, to reap the benefit of the reduced tipping fee, even though the hauler paid none of the waste management fee.

A "subsidy" of this type, which leaves to the hauler the choice whether to take advantage of a subsidized, lower-priced processing option, is precisely the sort of government

expenditure this Court has suggested as a constitutional alternative to discriminatory in-state processing requirements. *See South-Central Timber Dev't, Inc. v. Wunnicke*, 467 U.S. 82, 95 (1984) ("If the State directly subsidized the timber-processing industry by such an amount, the purchaser would retain the option of taking advantage of the subsidy by processing timber in the State or foregoing the benefits of the subsidy and exporting unprocessed timber.").

The facts of this case are more closely analogous to *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), than to *West Lynn*. In *Commonwealth Edison*, out-of-state utility companies alleged that a Montana severance tax on coal mined in Montana violated the Commerce Clause because ninety percent of Montana coal was shipped to other states, so that the "tax burden is borne primarily by out-of-state consumers." 453 U.S. at 617-18. This Court held that no real discrimination arose from the severance tax because the tax burden was borne "according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers." *Id.*

Petitioners are in a position no different from the out-of-state utility companies in *Commonwealth Edison*, except that Petitioners did not actually pay a cent of WLSSD's waste management fee themselves. In this case, the waste management fee was borne by WLSSD waste generators according to the volume of solid waste generated, and not according to any distinction between in-state and out-of-state haulers or disposal sites. Neither the coal severance tax nor the waste management fee imposed any differential burden on any part of the stream of commerce, and without such a discriminatory burden, the Commerce Clause is not violated. *See Commonwealth Edison*, 453 U.S. at 618-19.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THIS COURT'S DECISION IN *CARBONE* AND DOES NOT WARRANT REVIEW.

Petitioners claim that the decision below conflicts with this Court's decision in *Carbone*, alleging that WLSSD's waste management fee/tipping fee combination discriminated against interstate commerce in the same manner as the flow control ordinance invalidated in *Carbone*. Petitioners also claim that because WLSSD used the waste management fee/tipping fee combination to replace flow control, the measure had a discriminatory purpose. These arguments ignore both the facts and holding of *Carbone*, and the *Carbone* Court's suggested non-discriminatory alternatives to flow control.

The flow control ordinance invalidated in *Carbone* required that all solid waste generated within the Town of Clarkstown be processed at a town-designated transfer station. 511 U.S. at 386. The ordinance discriminated against interstate commerce because it foreclosed other waste processors, including out-of-state firms, from access to Clarkstown waste. *Id.*

The ordinance at issue in this case, by contrast, taxed generation of waste within WLSSD, but required no one to process such waste at WLSSD's RDF Facility. Trash haulers were free to transport the waste out-of-state. *Carbone* held only that "local governments may not use their regulatory power to favor local enterprise by *prohibiting* patronage of out-of-state competitors or their facilities." 511 U.S. at 394 (emphasis added). Nothing in *Carbone* prohibits government service providers from using economic incentives to attract users. In fact, the *Carbone* Court suggested the opposite.

The *Carbone* Court stated that in lieu of waste designation, the Town of Clarkstown could have subsidized its waste processing facility to permit it to charge a tipping fee

sufficiently competitive to give the facility an "advantage over rival business from out of State." *See Carbone*, 511 U.S. at 387, 394; *see also id.* at 504-06 (O'Connor, J., concurring in judgment) (town could finance project by lowering its price for processing to a level competitive with other waste processing facilities); *cf. id.* at 429-30 (Souter, J., dissenting) (noting that subsidies from general tax revenues approved by majority could "effectively squelch competition by underbidding it"). If the possibility of a municipal waste processing facility winning business away from out-of-state rivals with a subsidized tipping fee were an unconstitutional burden on interstate commerce, this Court would not have suggested subsidies as a permissible alternative to flow control.[10]

In fact, this Court has several times suggested subsidies as a permissible alternative to regulations which violate the Commerce Clause. *See Carbone*, 511 US. at 394; *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *Wunnicke*, 467 U.S. at 95. The Court did not make these suggestions without recognizing that subsidies would effectively confer a commercial advantage over the subsidized entity's out-of-state competitors. *See Limbach*, 486 U.S. at 278; *Wunnicke*, 467

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[10] In *Carbone*'s wake, several federal courts have suggested taxes similar to WLSSD's 1996 waste management fee to finance subsidies of municipal waste facilities. *See Waste Management, Inc. of Tennessee v. Metropolitan Gov't of Nashville & Davidson County*, 130 F.3d 731, 737 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3525 (U.S. Feb. 2, 1998) (No. 97-1259); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 112 F.3d 652, 665-66 (3d Cir.), *cert. denied*, 118 S. Ct. 412 (1997); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566, 1581 (M.D. Ala. 1993), *aff'd*, 29 F.3d 641 (11th Cir. 1994); *see also USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1286 (2d Cir. 1995) (upholding subsidy of municipal waste disposal facility funded through volume-based fees imposed uniformly on all waste generators located within garbage collection district), *cert. denied*, 116 S. Ct. 1419 (1996).

U.S. at 95. The Commerce Clause simply does not prohibit all state action designed to give local interests an advantage in the interstate market, *Limbach*, 486 U.S. at 278, or every state action that has the effect of reducing the flow of goods in interstate commerce, *see Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805 (1976).[11]

Carbone also fails to support Petitioners' claim that a discriminatory purpose motivated WLSSD's waste management fee/tipping fee combination. In fact, *Carbone* drew a critical distinction between flow control regulations that *require* the use of an in-state processing facility and economic incentives that *encourage* the use of such facilities.

Carbone did not hold that Clarkstown's flow control ordinance had a discriminatory purpose, even though the avowed purpose of the ordinance was to amortize the cost of Clarkstown's waste processing facility. *See* 511 U.S. at 386. Rather, Clarkstown's flow control ordinance was unconstitutional because of its discriminatory *effect* on interstate commerce. *See id.* at 389-90 ("These economic

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[11] With the exception of *Carbone*, every case in which this Court has suggested "general tax subsidies" as an alternative to an unconstitutional local regulation has involved state efforts to favor local private enterprise over out-of-state competition. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, ____ U.S. ___, 117 S. Ct. 1590, 1601 n.16 (1997) (suggesting that the State of Maine subsidize private non-profit camps serving residents rather than offering them a property tax exemption); *Limbach*, 486 U.S. at 278 (noting that Indiana subsidy offered to private Indiana ethanol manufacturers did not violate the Commerce Clause, although Ohio fuel sales tax exemption for ethanol produced by Ohio manufacturers did); *Wunnicke*, 467 U.S. at 95 (Alaska could permissibly offer direct subsidies to local private timber-processing industry, although it could not require buyers of state timber to use services of local timber processors prior to taking timber out of state). Even in *Carbone*, the transfer station favored by flow control was privately owned at the time the case arose. 511 U.S. at 387. A private contractor had agreed to build the facility and run it for five years, after which Clarkstown was to purchase it for $1. *Id.*

effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause. . . . Our initial discussion of the *effects* of the ordinance on interstate commerce goes far toward refuting the town's contention that there is no discrimination in its regulatory scheme." (emphasis added)). This Court specifically noted that Clarkstown had less burdensome alternatives to achieve its *purpose* of ensuring the long-term survival of its facility in the face of out-of-state competition. *See id.* at 394. If that purpose itself were discriminatory, the Court would not have offered suggestions concerning permissible alternative means to achieve it.

WLSSD merely followed *Carbone*'s dictum in reducing the RDF Facility tipping fee and subsidizing its other environmental programs and RDF Facility debt service with revenue from a waste generation tax. Neither the purpose nor the effect of these measures discriminated against interstate commerce. *See Limbach*, 486 U.S. at 278; *Hughes*, 426 U.S. at 805.

III. LOCAL TAXES MAY BE COLLECTED AND EARMARKED TO PAY FOR SPECIFIC GOVERNMENT-PROVIDED SERVICES WITHOUT VIOLATING THE COMMERCE CLAUSE.

Petitioners do not deny that *Carbone* endorsed subsidies to government waste processing facilities financed through "general taxes or municipal bonds." *See* 511 U.S. at 394. Petitioners' challenge to WLSSD's waste management fee, however, is based on their assertion that this tax cannot constitute a "general tax" because the Minnesota statute which authorizes the tax restricts use of its revenues to waste management services, rather than permitting the proceeds to be commingled in a "general fund" available for other

competing purposes. Neither *Carbone*, *West Lynn*, nor this Court's Commerce Clause tax jurisprudence supports Petitioners' argument that a government expenditure for services provided in competition with the private sector is constitutionally infirm if it is funded through a tax whose proceeds are earmarked for specific purposes.

A. *Complete Auto Transit* and Its Progeny Include No "General Tax" Requirement.

This Court's Commerce Clause tax cases do not require that proceeds from a challenged tax go into a general fund to comply with the Commerce Clause. These cases hold that a local tax is permissible if it is applied to an activity with a substantial nexus with the taxing jurisdiction, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the taxing jurisdiction. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

This Court's Commerce Clause tax cases typically have involved a state tax imposed on a specific activity with some nexus to the taxing jurisdiction, whose proceeds were earmarked to reimburse or "subsidize" the taxing jurisdiction's expenditures for infrastructure or services related to the taxpayer's activities in the state. *See Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 178 (1994) (tax on bus ticket sales); *Goldberg v. Sweet*, 488 U.S. 252, 256-57 (1989) (tax on telephone calls); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 26-27 (1988) (use tax on catalogs distributed within state); *Commonwealth Edison*, 453 U.S. at 612 (coal severance tax); *Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 736 (1978) (business and occupation tax). Presumably because it was irrelevant to the constitutionality of the tax at issue, these cases contain scant discussion of the extent to which revenues from the

challenged taxes were commingled in a general fund or made available for competing purposes.[12] Rather, with respect to collection and use of tax revenue, these cases inquire only whether the tax is fairly related to the benefits the state confers on the taxpayer. *Jefferson Lines*, 514 U.S. at 199. This test "requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is the state limited to offsetting the public costs created by the taxed activity." *Id.*

B. This Court's User Fee Cases Include No "General Tax" Requirement.

This Court's user fee cases make equally clear that a local government is not limited to general tax revenues in subsidizing the cost of services it provides. User fees comport with the Commerce Clause if they reflect a fair, if imperfect, approximation of the cost of using government facilities for the taxpayer's benefit, do not discriminate against interstate commerce, and are not excessive in relation to the costs incurred by the taxing authorities. *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 717-19 (1972). *Delta Airlines* upheld $1 per passenger user fees imposed by the State of New Hampshire

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[12] The *Commonwealth Edison* Court did discuss the status of Montana's coal severance tax as a "general revenue tax" and the allocation of 50% of the tax revenues to a permanent trust fund requiring a legislative super-majority for appropriation. 453 U.S. at 613, 621. The Court did so, however, only in the course of rejecting appellants' claim that the revenue generated through the severance tax was grossly disproportionate to the value of any services the state provided to the coal mining industry under the "fairly related" prong of the *Complete Auto Transit* test. *See id.* at 620-21 & n.10, 11. Neither the status of the severance tax as a general revenue tax nor commitment of its revenues to a trust fund was a prerequisite to its compliance with the "fairly related" prong of the test.

and an Indiana airport authority. Revenues from the Indiana tax were held in a separate fund solely for application to airport construction, improvement and maintenance costs. 405 U.S. at 709. Revenues from the New Hampshire tax were allocated 50% to the state's aeronautical fund and 50% to municipalities or airport authorities owning the airports at which the fees were imposed. *Id.* at 710. The Court observed:

> [S]o long as the funds received by local authorities under the statute are not shown to exceed their airport costs, it is *immaterial* whether those funds are expressly earmarked for airport use. The State's choice to reimburse local expenditures through unrestricted rather than restricted revenues is not a matter of concern to these appellants.

405 U.S. at 720 (emphasis added). Thus, the Court focused solely on the relationship between the amount the fees raised and the amount the state would spend on infrastructure and services related to the taxed activity, not on handling or use of the fees once collected. *See New Hampshire Motor Transp. Ass'n v. Flynn*, 751 F.2d 43, 49 (1st Cir. 1984) (citing *Delta Airlines*, 405 U.S. at 719-20).[13]

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[13] WLSSD's waste management fee was a tax rather than a user fee because it financed many services including a household hazardous waste facility, a compost facility, mercury pollution reduction, landfill closure costs, and other education, recycling and waste planning activities. (Mn. App. 307-08, 327-71.) A user fee, by contrast, is a specific charge imposed for actual use of state-provided facilities. *See Commonwealth Edison*, 453 U.S. at 621.

C. Government Services Are Routinely Financed Through Earmarked Taxes Unavailable for Competing Purposes.

A government's expenditures to provide low- or no-cost services to its citizens are fundamentally different from a government's use of tax revenue to provide a competitive advantage to local private enterprise. If government services which also happen to be available from the private sector could be funded only through "general taxes" commingled in a fund available for every other conceivable government service, services provided by special-purpose political subdivisions such as school districts, hospital districts and municipal recreational authorities would be permissible only if self-supporting through tuition or other user charges.[14] These government services are commonly supported through taxes rather than full-cost user charges not, as Petitioners suggest, because "the market is saying that [these activities are] not a good use of social resources," but because there are good social reasons for government to provide and encourage the use of such services regardless of the individual user's ability to pay their full cost.[15] *See supra* note 3.

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[14] Special purpose political subdivisions and special taxing districts are commonplace at the state and local government level._ Minnesota alone, for example, authorizes sanitary districts, school districts, hospital districts, and park districts, among others. Minn. Stat §§ 115.19, 477.31, 398.01; Minn. Stat. ch. 122. In New York, local improvement districts may be established to provide specific services including sewers, drainage, water quality treatment, parks, public parking, lighting, snow removal, sidewalks, fallout shelters, ambulance service, and duck waste disposal. *See USA Recycling*, 66 F.3d at 1286 & n.13. All such special-purpose districts have the ability to spend tax revenues only for the purposes for which the districts are created.

[15] Petitioners concede that the Commerce Clause does not prohibit local funding of public schools. *See* Petition for Writ of Certiorari at 22. Waste disposal, however, is no less a traditional government function than

D. The Waste Management Fee Was as "General" a Tax as WLSSD Is Authorized to Impose, and Afforded the Same Procedural Safeguards as Any Other Tax.

Unlike states, WLSSD has no general taxing authority, and cannot amass an undifferentiated pool of "general revenues" through a variety of income, sales, use, excise, and other taxes to be applied to a wide range of government services. To finance its solid waste facilities and services, WLSSD is statutorily authorized only to impose property taxes upon taxable property within its boundaries, to impose rates for the use of solid waste disposal sites and facilities, and to impose rates and charges for other solid waste management and environmental services. *See* Minn. Stat. §§ 400.08, subd. 3; 458D.10; 458D.111; 458D.15. (R.A. 14-16; App. 92-93, 97.) Each method of revenue generation may be imposed only on property owners, lessees or occupants within WLSSD's boundaries, and the revenues generated may be used only for WLSSD's narrow range of authorized services. *See* Minn. Stat. §§ 400.08, subd. 3; 458D.15. (App. 92-93, 97.)

Petitioners argue that WLSSD's waste management fee cannot be a "general tax" because it allegedly was adopted without the political safeguards which ordinarily accompany the imposition of a "general tax." *See West Lynn*, 512 U.S. at 200 ("Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects

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public education, a fact this Court has long recognized. *See California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 320-21 (1905). In fact, 80% of the landfills receiving municipal solid waste in the United States are owned by state or local governments. *See Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93, 114 (1994) (Rehnquist, J., dissenting).

on interstate commerce, in part because '[t]he existence of major in-state interests adversely affected ... is a powerful safeguard against legislative abuse.'"). On the contrary, the processes through which WLSSD received and exercised its taxing authority afforded full participation to all those adversely affected by the tax. WLSSD was created and empowered by the Minnesota Legislature, a body in which all state residents are represented. Prior to enacting the waste management fee ordinance, WLSSD provided notice and held public hearings in which all its residents, including trash haulers, were entitled to participate. (App. 11, 93.) WLSSD residents, the prospective payers of the tax, preferred a volume-based generation fee to an ad valorem property tax levy, not because the former provided them with any advantage over out-of-state competitors, but because the latter bore no relation to the amount of waste they generated. (Mn. App. 603.) And unlike the in-state dairy farmers in *West Lynn*, who were the recipients of a direct cash subsidy to prevent them from exercising their political voices in opposition to the Massachusetts milk tax, WLSSD waste generators were the only ones to pay the waste management fee but received no subsidy.

Under these circumstances, there was no "mollifying" rebate or subsidy to in-state interests to distort the political process. *See West Lynn*, 512 U.S. at 200. The only "subsidy" in this case went to the taxing authority, WLSSD. *See USA Recycling*, 66 F.3d at 1292 ("If anyone is 'subsidized' by the user fees, it is the municipal treasury -- not any private business. And that, of course, is the point of every tax.").

Petitioners have argued throughout this litigation that property taxes offered WLSSD a permissible "general tax" means of financing a lower tipping fee at its RDF Facility. A subsidy to WLSSD's RDF Facility funded by property taxes rather than a volume-based generation fee, however, would be paid by the same population, imposed through the same

political process, available for the same limited range of environmental and waste management services, and would have an identical effect on out-of-state landfills. The waste management fee was imposed on property owners, lessees, and occupants within WLSSD, the same parties on whom a property tax for solid waste management services could be imposed following notice and public hearings. *See* Minn. Stat. § 400.08, subd. 2. (R.A. 1.) A property tax may be imposed solely to finance solid waste disposal sites and facilities and solid waste management and environmental services. *See* Minn. Stat. §§ 400.08, subd. 3; 458D.10; 458D.15. (R.A. 1-2, 14-15; App. 97.) A property tax subsidy would permit WLSSD to reduce the tipping fee at its RDF Facility, encouraging haulers of local waste to deliver it to WLSSD rather than incurring transfer and transportation expenses to export the waste to out-of-state landfills.[16] The volume-based waste generation fee therefore was, for Commerce Clause purposes, just as "general" a tax as Petitioners' proposed property tax alternative.

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[16] The sole difference between a property tax and a volume-based waste generation fee would be the tendency of the latter to encourage waste reduction through recycling. Taxing property owners on the assessed value or occupancy of their real estate rather than on the volume of waste they generate provides no incentive whatever to recycle or reduce waste generation. Similarly, use of a property tax provides no assurance that the parties taxed are paying for a share of the costs of waste disposal and other environmental programs and services in any way proportional to their use of or benefit from such services. *See USA Recycling*, 66 F.3d at 1292.

IV. THIS CASE PRESENTS NO IMPORTANT QUESTIONS REQUIRING RESOLUTION BY THIS COURT.

A. *Complete Auto Transit* and Its Progeny Answer All Questions this Case Raises.

Petitioners also urge review of the decision below to clarify what constitutes a general revenue tax for Commerce Clause purposes and the lengths to which local government may go in subsidizing local business. This case presents neither question.

The "general revenue tax" issue arises out of dicta in *West Lynn* to the effect that a "pure subsidy funded out of general revenue ordinarily poses no burden on interstate commerce." 512 U.S. at 199. As noted above, *West Lynn* involved subsidies to private dairy farmers. This case, in contrast, involves a municipality's taxation of its own residents to fund services provided by the municipality itself. This Court has never suggested that local government may provide services only if they are financed through "general revenue taxes." Rather, this Court has traditionally analyzed the constitutionality under the Commerce Clause of local taxes to fund government services under the test articulated in *Complete Auto Transit*. *See* 430 U.S. at 279.

Consistent with that test, the waste management fee was fairly related to the government services for which it was imposed. The tax was imposed solely on waste generators producing waste within WLSSD's boundaries, the same population which benefits from the sewage treatment, waste management and other environmental services WLSSD provides. The waste management fee taxed the generation of waste, an activity occurring only within WLSSD, and therefore having a substantial nexus with the taxing jurisdiction. The tax was fairly apportioned; each generator

paid it based on the volume of waste generated, regardless of whether such waste was destined for disposal inside WLSSD's boundaries or out of state. Finally, the tax did not discriminate against interstate commerce. It applied to all waste generated within WLSSD, regardless of its destination, and all waste subject to the tax could but was not required to be disposed of for the reduced tipping fee at WLSSD's RDF Facility.

The crux of Petitioners' objection to the waste management fee is that WLSSD's ability to use tax revenues to subsidize the price of its disposal facility gives it a competitive advantage over private landfills. Petition for Writ of Certiorari at 22. In reality, it is the fact of the subsidy, and not its funding source, that Petitioners find objectionable. *Id.* at 21. ("Plainly, if a subsidy is needed to operate the WLSSD incinerator, then the market is saying that this activity is not a good use of social resources."). A subsidy from any source, including "general tax revenues," would have the same effect on Petitioners as the waste management fee; it would permit a reduced tipping fee that would encourage patronage of WLSSD's RDF Facility. *Carbone* makes clear that such an effect, however, does not constitute discrimination against interstate commerce. *See* 511 U.S. at 394 (Clarkstown could subsidize its facility through general taxes or municipal bonds even though it elected to use the open market to earn revenues for its facility). The Minnesota Supreme Court's decision is fully consistent with this Court's precedents and there is no reason for the Court to inject a "general tax revenue" inquiry into the *Complete Auto Transit* test.

B. This Case Does Not Present the Question Left Unanswered in *Camps Newfound.*

This case also does not present the question left open in *Camps Newfound*, whether a state may subsidize local *private*

enterprise in competition with out-of-state businesses.[17] *See Camps Newfound*, 117 S. Ct. at 1605. Rather, this case presents only the unremarkable question whether a municipality may finance services provided to its residents by a tax imposed solely on those residents. That the same services may be available from out-of-state private competitors should not change the analysis.

C. Review by this Court Would Not Increase Interstate Commerce in WLSSD Waste.

The challenged waste management fee expired sixteen months ago. Since then, WLSSD has financed its RDF Facility debt payments and other costs not covered by the tipping fee through property taxes, precisely the alternative Petitioners have suggested would be constitutional.[18] Under these circumstances, reversal of the decision below would have no impact on interstate commerce in WLSSD waste.

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[17] Both cases in which this Court has noted that it has not yet squarely addressed the constitutionality of subsidies make clear that by "subsidies" the Court was referring to government aid to local private business, not government expenditures made to provide government services. *See Camps Newfound*, 117 S. Ct. at 1605 (noting that possible constitutionality of direct subsidies to private camps did not validate discriminatory tax exemption serving same ends); *West Lynn*, 512 U.S. at 199 n.15 (noting in context of state subsidy to private dairy farmers that direct subsidization of "domestic industry" does not ordinarily violate Commerce Clause).

[18] The only impediment to Petitioners disposing of WLSSD waste out of state is their inability thus far to obtain permission from the City of Superior, Wisconsin to site a transfer station there. (R.A. 35-37.) Review by this Court of the decision below would have no effect on that circumstance.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari. The decision below is consistent with both *West Lynn* and *Carbone* and presents no important federal questions meriting decision by this Court.

Dated: April 22, 1998.

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MINNESOTA STATUTORY PROVISIONS

400.08 Service areas and charges.

Subdivision 1. Definition. For purposes of this section, "solid waste management services" includes recycling and waste reduction services, collection, processing, and disposal of solid waste, closure and postclosure care of a solid waste facility, and response, as defined in section 115B.02, to releases from a solid waste facility or closed solid waste facility.

Subd. 2. Service areas. In addition to the power that the county may exercise under other law, and in order to provide solid waste management services to those areas needing services, the county board by resolution may establish and determine the boundaries of solid waste management service areas in the county. Before the adoption of the resolution the county board shall hold a public hearing on the question. If a service area is established, the county board may impose service charges for solid waste management services for the area and may levy a tax on all the property in the area, or any combination of charges and taxes. The county board may enlarge any existing service area following the procedures specified in this section. Upon the petition of the landowner, land may be added to the service area without a public hearing on the enlargement.

Subd. 3. Service charges. The county may establish by ordinance, revise when deemed advisable, and collect just and reasonable rates and charges for solid waste management services provided by the county or by others under contract with the county. The ordinance may obligate the owners, lessees, or occupants of property, or any or all of them, to pay charges for solid waste management services to their

properties, including properties owned, leased, or used by the state or a political subdivision of the state, the metropolitan airports commission established in section 473.603, the state agricultural society established in section 37.01, a local government unit, and any other political subdivision, and may obligate the user of any facility to pay a reasonable charge for the use of the facility. Rates and charges may take into account the character, kind, and quality of the service and of the solid waste, the method of disposition, the number of people served at each place of collection, and all other factors that enter into the cost of the service, including but not limited to depreciation and payment of principal and interest on money borrowed by the county for the acquisition or betterment of facilities. A notice of intention to enact an ordinance, published pursuant to section 375.51, subdivision 2, shall provide for a public hearing prior to the meeting at which the ordinance is to be considered.

Subd. 4. Collection. (a) The rates and charges may be billed and collected in a manner the board shall determine

(b) On or before October 15 in each year, the county board may certify to the county auditor all unpaid outstanding charges, and a description of the lands against which the charges arose. It shall be the duty of the county auditor, upon order of the county board, to extend the assessments, with interest not to exceed the interest rate provided for in section 279.03, subdivision 1, upon the tax rolls of the county for the taxes of the year in which the assessment is filed. For each year ending October 15 the assessment with interest shall be carried into the tax becoming due and payable in January of the following year, and shall be enforced and collected in the manner provided for the enforcement and collection of real property taxes in accordance with the provisions of the laws of the state. The charges, if not paid, shall become delinquent

and be subject to the same penalties and the same rate of interest as the taxes under the general laws of the state.

(c) In addition to any other manner of collection that may be established under paragraph (a), a county may:

(1) require as a condition of a license issued under section 115A.93 that the licensee collect service charges established under subdivision 3 from solid waste generators for remittal to the county; and

(2) audit a licensed collector's records of the charges collected under clause (1) and the amount of waste collected only to the extent necessary to ensure that all charges required to be collected are remitted to the county.

Data received under clause (2) are private or nonpublic data as defined in section 13.02, subdivision 9 or 12.

Subd. 5. Financial incentives to recycle. A county may:

(1) charge or may require any person who collects solid waste in the county to charge solid waste generators rates for solid waste management services that increase as the weight or volume of waste increases;

(2) require collectors to provide financial incentives to solid waste generators who separate recyclable materials from their waste; or

(3) require use of any other mechanism to provide encouragement or rewards to solid waste generators who reduce their waste generation or who separate recyclable materials from their waste.

458D.03 Sanitary Board.

Subdivision 1. Establishment. A sanitary board with jurisdiction in the Western Lake Superior Sanitary District is established as a public corporation and political subdivision of the state with perpetual succession and all the rights, powers, privileges, immunities, and duties which may be validly granted to or imposed upon a municipal corporation, as provided in sections 458D.01 to 458D.24.

Subd. 2. Members and selection. The board shall be composed of nine members selected as follows:

(a) The mayor of the city of Duluth shall select four members and shall designate the term of each such member in accordance with subdivision 5, subject to the approval of the Duluth city council.

(b) The Cloquet city council by majority vote shall select three members and shall designate the term of each member in accordance with subdivision 5.

(c) The elected chief executives of all other municipalities in the district in the county of Carlton shall elect one member. The auditor of the county of Carlton shall, upon at least ten days, notice by mail, call a meeting of such chief executives, to be held at a suitable place in the district designated in the notice by the auditor. At the meeting, said chief executives shall elect the board member. A majority of the elected chief executives present in person or by their duly designated representatives shall constitute a quorum, but less than a majority may adjourn the meeting from time to time and compel the attendance of absent chief executives or their duly designated representatives. Each chief executive shall have one vote and an additional vote for each full 1,000

population in the municipality according to the latest census. The majority of the votes cast by the chief executives present and voting shall be required for election of the board member. Any chief executive may designate some other elected official of the same governing body of the municipality to attend the meeting in the chief executive's place and exercise the same voting power to which the chief executive would be entitled if present.

(d) The elected chief executives of all other municipalities in the district in the county of St. Louis shall elect one member. The auditor of the county of St. Louis shall, upon at least ten days, notice by mail, call a meeting of such chief executives, to be held at a suitable place in the district designated in the notice by the auditor. At the meeting, such chief executives shall elect the board member. A majority of the elected chief executives present in person or by their duly designated representatives shall constitute a quorum, but less than a majority may adjourn the meeting from time to time and compel the attendance of absent chief executives or their duly designated representatives. Each chief executive shall have one vote and an additional vote for each full 1,000 population in the municipality according to the latest census. The majority of the votes cast by the chief executives present and voting shall be required for election of the board member. Any chief executive may designate some other elected official of the same governing body of the municipality to attend the meeting in the chief executive's place and exercise the same voting power to which the chief executive would be entitled if present.

Subd. 3. Time limits for selection; alternative appointment by district judge. The nine board members to be selected under subdivision 2, paragraphs (a), (b), (c) and (d), shall be selected as hereinbefore provided within 60 days

after July 8, 1971. The successor to each board member shall be selected at any time within 60 days before the expiration of the term in the same manner as the predecessor was selected. Any vacancy on the board shall be filled within 60 days after it occurs. If any selection is not made as hereinbefore provided within the time prescribed therefor, the chief judge of the sixth judicial district of the Minnesota district court on application by any interested person shall forthwith appoint an eligible person to the board with like effect as if the selection were made as hereinabove or otherwise provided.

Subd. 4. Vacancies. If the office of any board member becomes vacant, the vacancy shall be filled for the unexpired term in like manner as provided for selection of the member who vacated the office. The office shall be deemed vacant under the conditions specified in section 351.02, or if the member fails to attend two consecutive regular meetings of the board without the consent of the board given no later than 30 days after the second such meeting.

Subd. 5. Terms of office. The terms of the first board members shall expire on July 1 in the following calendar years: Two of the board members selected under subdivision 2, paragraph (a), and one of the board members selected under subdivision 2, paragraph (b), in the year 1972; another board member selected under subdivision 2, paragraph (a), and another board member selected under subdivision 2, paragraph (b), in the year 1973; another board member selected under subdivision 2, paragraph (a), another board member selected under subdivision 2, paragraph (b), and the board member elected under subdivision 2, paragraph (d), in the year 1974. Succeeding terms of all board members shall be three years, except that each member shall serve until a successor has been duly selected and qualified.

Subd. 6. Removal. A board member may be removed by the governor for malfeasance or nonfeasance in the performance of official duties as provided by sections 351.14 to 351.23.

Subd. 7. Qualifications. Each board member shall be a resident of the district and may but need not be an elected public official.

Subd. 8. Certificates of selection; oath of office. A certificate of selection of every board member selected under subdivision 2, paragraphs (a) and (b), stating the term for which the member was selected, shall be made by the respective city clerks, and a certificate of selection of the board member elected pursuant to subdivision 2, paragraphs (c) and (d), shall be made by the respective county auditors. Such certificates, with the approval appended by other authority, if required, shall be filed with the secretary of state. Counterparts thereof shall be furnished to the board member and the secretary of the board. Each member shall qualify by taking and subscribing the oath of office prescribed by the Minnesota Constitution, article 5, section 6. Such oath, duly certified by the official administering the same, shall be filed with the secretary of state and the secretary of the board.

Subd. 9. Board members' compensation. Each board member shall be paid a per diem compensation of $35 for meetings and for such other services as are specifically authorized by the board, and shall be reimbursed for all reasonable expenses incurred in the performance of the member's duties as determined by the board.

* * *

458D.05 Comprehensive plan.

Subdivision 1. Board plan and program. The board shall prepare and by resolution adopt a comprehensive plan for the collection, treatment, and disposal of sewage in all or a designated part of the district through a system of interceptors and treatment works for such designated period as the board deems proper and reasonable; and, when adopted, such plan shall be followed in that part of the district covered in the plan, subject to the provisions of sections 458D.01 to 458D.24. The plan shall take into account the preservation and best and most economic use of water and other natural resources in the area; the preservation, use and potential for use of lands adjoining waters of the state to be used for the disposal of sewage; and the impact such a disposal system will have on present and future land use in the area affected thereby. The plan shall include the general location of needed interceptors and treatment works, a description of the area that is to be served by the various interceptors and treatment works, a long range capital improvements program and such other details as the board shall deem appropriate. In developing the plan, the board shall consult with persons designated by governing bodies of any municipal or public corporation or governmental or political subdivision or agency within the district to represent such entities for such purpose and shall consider the data, resources and input offered to the board by such entities and any planning agency acting on behalf of one or more such entities. Such plan may be revised as often as the board deems necessary.

Subd. 2. Solid waste plan. The board shall prepare by January 1, 1975, and by resolution adopt a comprehensive plan for the management and disposal of solid waste in the district. The plan shall be subject to the approval of the agency. In developing the plan, the board shall consider the

preservation and best and most economical use of the land and water resources in the district. The plan shall include a statement of goals and policies for solid waste disposal, criteria for solid waste disposal sites, the general location and capacities of needed disposal sites and facilities, projections of disposal capacities required, regulations for the operation of disposal sites and facilities, a description of disposal techniques which may be used, the type or types of solid waste to be disposed of at each site or facility, a long range capital improvements program and such other details as the board shall require. Criteria for solid waste disposal sites and regulations for the operation of disposal sites and facilities, included in the plan, shall be consistent with regulations adopted by the agency. The plan may provide for the continued operation or acquisition and operation of disposal sites or facilities by local government units, private persons or the board and may provide that only the board shall own, maintain and operate disposal sites and facilities within the district. In developing the plan, the board shall consult with persons designated by governing bodies of any municipal or public corporation or governmental or political subdivision or agency within the district and shall consider their data. The plan may be revised as often as the board deems necessary. A copy of the comprehensive plan and each revision thereof shall be delivered or mailed to the agency, the county auditor of each county located within the district and the clerk of each city and township in the district. Prior to the adoption by the board of its comprehensive plan, no local government unit shall acquire any solid waste disposal site or facility unless approved by the board. After the comprehensive plan is adopted local government units and persons shall acquire and operate solid waste disposal sites and facilities in accordance with the plan. The board shall hold hearings as provided in subdivision 2 and coordinate with municipal plans as provided in subdivision 3.

Subd. 3. Comprehensive plans; hearing. Before adopting the first or any subsequent comprehensive plan the board shall hold a public hearing on such proposed plan at such time and place in the district as it shall determine. The hearing may be continued from time to time. Not less than 45 days before the hearing, the board shall publish notice thereof in a newspaper or newspapers having general circulation in the district, stating the date, time and place of the hearing, and the place where the proposed plan may be examined by any interested person. At the hearing, all interested persons shall be permitted to present their views on the plan.

Subd. 4. Municipal plans and programs; coordination with board's responsibilities. As soon as practicable after the adoption by the board of the first applicable comprehensive plan, and before undertaking the construction of new sewers or other disposal facilities or the substantial alteration or improvement of any existing sewers or other disposal facilities, each local government unit included in the plan shall adopt a similar comprehensive plan and program for the collection, treatment and disposal of sewage for which the local government unit is responsible, coordinated with the board's plan, and may revise the same as often as it deems necessary. Each such local plan or revision thereof shall be submitted forthwith to the board for review and shall be subject to the approval of the board as to those features of the plan affecting the board's responsibilities as determined by the board. Any such features disapproved by the board shall be modified in accordance with the board's recommendations. once the board's plan is adopted, no such construction project involving such features shall be undertaken by the local government unit unless its governing body shall first find the project to be in accordance with the government unit's comprehensive plan and program as approved by the board. Prior to approval by the board of the comprehensive plan and

program of any local government unit in the district, no such construction project shall be undertaken by such government unit unless approval of the project is first secured from the board as to those features of the project affecting the board's responsibilities as determined by the board.

* * *

458D.07 Sewage collection and disposal.

Subdivision 1. Powers. In addition to all other powers conferred upon the board in sections 458D.01 to 458D.24, it shall have the powers specified in this section.

Subd. 2. Solid waste disposal. The board may implement its comprehensive plan, acquire, construct, better, equip, operate and maintain all solid waste disposal sites or facilities within the district. A solid waste disposal site or facility owned by a local government unit or private person may, after payment of just compensation, be acquired or operated by the board.

Except as otherwise provided hereafter, should the comprehensive plan provide for the operation of one or more disposal sites or facilities by the district, the district shall acquire, subject to the payment of just compensation, the disposal facility, both real and personal property presently operated by Carlton county, and located in section 9, township 48 north, range 17 west, Carlton county, Minnesota, and the disposal facility, both real and personal property, presently operated by Duluth Disposal Company and located in section 31, township 51, range 14, St. Louis county, Minnesota. Notwithstanding such requirement, the district and Carlton county, or the district and Duluth Disposal Company, or its successors and assigns, as the case may be, may, by

agreement, provide for the continued ownership or operation of the disposal facilities referred to above by Carlton county or such company, as the case may be, upon such terms and subject to such conditions as the district and Carlton county or the district and such company may agree.

Subd. 3. Solid waste disposal method. (a) Except as provided in paragraph (b), the board shall treat and dispose of solid waste by landfill, incineration or other disposal method subject to the rules and regulations of the agency.

(b) Ash produced by the fluidized bed sewage sludge incinerators operated by the board is not subject to rules adopted by the agency under section 115A.97, subdivision 3, provided that the ash is disposed of under the rules of the agency relating to the disposal of industrial solid waste.

Subd. 4. Utilization of district system. (a) The board may provide that every person or local government unit located in the district must dispose of solid waste as provided in the comprehensive plan.

(b) Upon the adoption of a solid waste plan under section 458D.05, subdivision 2, the plan governs all solid waste management in the district and a public entity, as defined in section 16B.122, subdivision 1, within the district may not:

(1) enter into a binding agreement governing a solid waste management activity that is inconsistent with that plan, without the consent of the district; or

(2) develop or implement a solid waste management activity, other than an activity to reduce waste generation or reuse waste materials, that is inconsistent with a solid waste

plan that the district is actively implementing, without the consent of the district.

Subd. 5. Collection process. Nothing contained in this chapter shall be construed to permit the district to engage in the collection of solid waste.

Subd. 5a. Recycling. The district may require recycling and regulate the collection of recyclable materials in the district.

Subd. 6. Discharge of treated sewage. The board shall have the right to discharge the effluent from any treatment works operated by it into any waters of the state, subject to the approval of the agency if required, and in accordance with any effluent or water quality standards lawfully adopted by the agency, by any interstate agency or by any federal agency having jurisdiction.

Subd. 7. Utilization of district system. The board may require any person or local government unit located in the district to provide for the discharge of any sewage, directly or indirectly, into the district disposal system, or to connect any disposal system or a part thereof with the district disposal system wherever reasonable opportunity therefor is provided; may regulate the manner in which such connections are made; may require any person or local government unit discharging sewage into the disposal system to provide preliminary treatment therefor; may prohibit the discharge into the district disposal system of any substance which it determines will or may be harmful to the system or any persons operating it; and may require any local government unit to discontinue the acquisition, betterment, or operation of any facility for such unit's disposal system wherever and so far as adequate service is or will be provided by the district disposal system.

Subd. 8. System of cost recovery to comply with applicable regulations. The board may require that any charges, connection fees or other cost recovery techniques imposed by a local government unit on persons discharging sewage directly or indirectly into the district disposal system, comply with applicable state and federal law, including but not limited to state and federal regulations governing grant applications.

* * *

458D.10 Costs of solid waste disposal.

Subdivision 1. Definition of current costs. The estimated cost to the district of the administration, operation, maintenance and debt service of solid waste disposal sites or facilities and the estimated costs of acquisition and betterment of the disposal sites or facilities which the board shall incur in the budget year, other than cost of acquisition and betterment which are payable out of state or federal grants and bond proceeds, and all other previously unrecovered costs incurred by the board are referred to as current costs and shall be recovered by the board through a system of user charges.

Subd 2. Method of recovering current costs. Prior to commencing the operation of any solid waste disposal site or facility, the board shall establish a system of nondiscriminatory rates for the use of solid waste disposal sites and facilities. The rates shall be designed to recover current costs. The rates shall be adjusted by the board at any time to reflect actual costs of operating the disposal sites and facilities.

Subd. 3. Emergency certificates of indebtedness. Notwithstanding the provisions of subdivision 1, if in any

budget year the receipts from user charges are insufficient to pay the current costs of operating such disposal sites and facilities, the board may issue negotiable general obligation certificates of the indebtedness in an amount sufficient to meet the deficiency. The certificates shall be issued as provided by section 458D.14, subdivisions 3 and 5.

Subd. 4. General obligation bonds. The board may by resolution authorize the issuance of general obligation bonds for the acquisition or betterment of solid waste disposal sites and facilities, including but without limitation, the payment of interest during construction and for a reasonable period thereafter, the establishment of a reserve for bond payments, working capital, refunding of outstanding bonds, certificates of indebtedness, or judgments. The board shall pledge its full faith and credit and taxing power for the payment of the bonds and provide for the issuance and sale and for the security of such bonds in the manner provided in chapter 475, and shall have the same powers and duties as a municipality issuing bonds under that law, except no election shall be required and the debt limitations of chapter 475 shall not apply to the bonds. The board may pledge for payment of the bonds, revenues received from users. The board may by resolution and prior to beginning operation of any solid waste disposal site or facility authorize the issuance of general obligation bonds in an amount not to exceed 50 percent of the estimated cost of operating the disposal site or facility for the first 12 months of operation. The estimated cost shall be the best estimate of the board declared in resolution form. The board shall pledge its full faith, credit and taxing powers for the payment of such bonds and provide for the issuance and sale and for the security of such bonds in the manner provided in chapter 475, and shall have the same powers and duties as a municipality issuing bonds under that law, except no election shall be required and the debt limitations of chapter 475 shall

not apply to the bonds. The board may also pledge for the payment of the bonds any revenues receivable from user charges.

* * *

458D.111 Collection of solid waste management service charges.

Subdivision 1. Authority. The board shall have the powers of a county as specified in section 400.08.

Subd. 2. Method of collecting certain service charges. The board shall determine the method of collecting service charges in a service area by resolution.

Subd. 3. Service charges on real estate including exempt property. In addition to any methods provided in section 400.08, the board may assess and collect service charges as follows. On or before October 15 of each year, the board shall certify to each county auditor an itemized list of solid waste management service charges and a description of parcels of lands against which the charges arise. It shall be the duty of the county auditors to include the charges upon the tax rolls of the county for the taxes due and payable for the following year. The solid waste management service charge shall be enforced and collected in the manner provided for the enforcement and collection of real property taxes. The service charges shall be subject to the same penalties, interest, and other conditions provided for the collection of property taxes. The board shall reimburse each county auditor for the costs of collection of the service charge.

* * *

January 10, 1996

ORDINANCE
SOLID WASTE MANAGEMENT FEE FOR THE WESTERN LAKE SUPERIOR SANITARY DISTRICT

PURPOSE

The purpose of this ordinance is to establish authority for a Western Lake Superior Sanitary District Solid Waste Management Fee to fund environmental programs which protect the health and welfare of local residents pursuant to State mandates governing waste management programs. This Solid Waste Management Fee will be implemented in the service area(s) designated by the Western Lake Superior Sanitary District pursuant to Minnesota Statute Section 400.08. The Ordinance includes: procedures for establishing a Solid Waste Management Fee for a service area; the fee payment method; reporting requirements; and penalties for noncompliance with provisions of this Ordinance. This Ordinance is adopted pursuant to Minnesota Statutes Chapter 458D and Section 400.08.

SECTION 1 DEFINITIONS

For the purpose of this Ordinance, the terms defined in this section shall have the meanings given them, unless the context clearly indicates otherwise.

Subsection 1 "Board" is the Sanitary Board of the Western Lake Superior Sanitary District.

Subsection 2 "District" is the Western Lake Superior Sanitary District.

Subsection 3 "Executive Director" is the Executive Director of the WLSSD.

Subsection 4 "Generate" is the act or process of producing waste.

Subsection 5 "Generator" is any Person who generates Mixed Municipal Solid Waste in the District or pays for Mixed Municipal Solid Waste collection or disposal services, or any Person who pays for Mixed Municipal Solid Waste collection or disposal services on behalf of a Person who generates Mixed Municipal Solid Waste in the District.

Subsection 6 "Hauler" is a Person engaged in the business of collecting, transporting or disposing of Mixed Municipal Solid Waste generated in the District, and includes a Self-Hauler.

Subsection 7 "Mixed Municipal Solid Waste" is garbage, refuse, and other solid waste from residential, commercial, industrial, and community activities that the Generator of the waste aggregates for collection, but does not include auto hulks, street sweepings, ash, construction debris, mining waste, sludges, tree and agricultural waste, tires, lead acid batteries, used oil, and other materials collected, processed and disposed of as separate waste streams.

Subsection 8 "Ordinance" is the WLSSD Solid Waste Management Fee Ordinance.

Subsection 9 "Person" includes, but is not limited to an individual, business, Self-Hauler, Hauler, public or private corporation, partnership, joint venture, association, trust, unincorporated association, government or agency or political subdivision thereof, landfill operator, Generator, any other

legal entity, and any receiver, trustee, assignee, agent, or other legal representative of any of the foregoing.

Subsection 10 "Self-Hauler" is a Person who transports for disposal its own Mixed Municipal Solid Waste.

Subsection 11 "Service Area" is the area designated by the Board as an area needing Solid Waste Management Services pursuant to Minnesota Statute Section 400.08.

Subsection 12 "Operating License" shall mean the license. required of all Persons in order to collect or transport Mixed Municipal Solid Waste that is generated within the District.

Subsection 13 "Solid Waste Management Fee" is the charge established by the District Board, payable to the District for Solid Waste Management Services provided within a Service Area.

Subsection 14 "Solid Waste Management Services" includes all activities provided by the District or by Persons under contract with the District which support the waste management responsibilities, described in Minnesota Statutes Chapters 115A and 458D and Section 400.08 including, but not limited to, waste reduction and reuse; waste recycling; composting of yard waste and food waste; resource recovery through Mixed Municipal Solid Waste composting or incineration; land disposal; public education; and management of problem materials, and household hazardous waste.

SECTION 2 GENERAL PROVISIONS

Subsection 1 Compliance: No Person shall collect, transport or dispose of Mixed Municipal Solid Waste generated in the

District except in full compliance with this Ordinance. This Ordinance shall not prevent the transportation of Mixed Municipal Solid Waste through the District.

Subsection 2 Solid Waste Management Fee: A Solid Waste Management Fee shall be imposed for Solid Waste Management Services provided by the District within a Service Area. Generators (owners, lessees, or occupants of property in the District, or any or all of them) shall pay the Solid Waste Management Fee imposed in the manner set forth herein in amounts as established by the Board.

Subsection 3 Procedures for Establishing the Amount of Solid Waste Management Fee: The Board shall establish the amount of the Solid Waste Management Fee by resolution, following a public hearing, and shall state the effective date for the enactment of the Solid Waste Management Fee. The amount of the Solid Waste Management Fee may be different in each Service Area.

Subsection 4 Procedures for Adjusting the Amount of Solid Waste Management Fee: The Board may adjust the amount of the Solid Waste Management Fee by resolution, following a public hearing, and shall state the effective date for the enactment of the adjusted Solid Waste Management Fee. There will be a minimum sixty (60) day period prior to the effective date of such adjustment.

SECTION 3 SOLID WASTE MANAGEMENT FEE - COLLECTION AND REMITTANCE POLICIES

Subsection 1 Collection:

A. As a condition of its Operating License, each Hauler shall bill and collect the Solid Waste Management

Fee from the District Generators for whom they haul Mixed Municipal Solid Waste.

B. Each Hauler shall make reasonable efforts to collect the Solid Waste Management Fee.

Subsection 2 Remittance:

A. The Solid Waste Management Fee collected by Haulers must be remitted to the District. Failure to remit the Solid Waste Management Fee collected may result in the revocation of the Hauler's Operating License.

B . If a Generator makes partial payment to a Hauler, the Hauler shall then apply payment to the Solid Waste Management Fee proportionally.

C Each Hauler shall remit the Solid Waste Management Fee by the last day of the month following the month in which the Solid Waste Management Fee was collected by a Hauler, or incurred by a Self-Hauler. The Executive Director, if requested in writing by a Hauler, may grant a variance from this 30 day payment requirement due to Hauler billing practices. The duration of the variance will be determined by the Executive Director.

Subsection 3 Statements: The District encourages each Hauler to, as soon as practicable (and within two (2) months from the effective date of this Ordinance), separately state and clearly label the Solid Waste Management Fee on each invoice or statement issued to their Generators for payment of waste collection and disposal services.

Subsection 4 Reports: Each Hauler shall complete a Solid Waste Management Fee report in accordance with instructions and on forms provided by the District. The Solid Waste Management Fee report, accompanied by any required Solid Waste Management Fees, must be submitted by the last day of the month following the month in which the Solid Waste Management Fee was incurred or collected by a Hauler or incurred by a Self-Hauler. The Solid Waste Management Fee report may include, but not be limited to, total gross billings and receipts for all collection and disposal services performed within the Service Area, the number of Residential and Nonresidential Generators within the Service Area, the number of tons collected within the Service Area and disposed of within and outside of the District, and such other information as requested by the District.

Subsection 5 Calculation of Solid Waste Management Fee: If the Executive Director determines, after review of the Solid Waste Management Fee report, or upon failure of a Hauler to submit the Solid Waste Management Fee report, that the Hauler has not supplied appropriate information, the Executive Director may recalculate the Hauler's Solid Waste Management Fee in accordance with this Subsection. If the Executive Director finds that the information supplied by the Hauler is inaccurate, incomplete or understated, the Executive Director, may in his or her sole discretion, determine an appropriate amount for the Solid Waste Management Fee due from the Hauler. The Executive Director shall send the Hauler a notice, by U.S. Mail, setting forth the recalculated Solid Waste Management Fee amount. The notice shall include a statement of the reasons why the Solid Waste Management Fee has been recalculated. The Executive Director may base the recalculation on information in District records or on any data currently or previously supplied by the

Hauler. The written notice shall be deemed received by the Hauler three (3) days after the date of mailing.

Subsection 6 Generators Without Hauler Service: The District may require Haulers to provide Generator lists, or otherwise cooperate to identify Generators within the District without Hauler service. Such Generators will either be assigned a Hauler in accordance with District Regulations or billed directly for the Solid Waste Management Fee in an amount determined in the sole discretion of the Executive Director of the District. The Executive Director, if assessing the Solid Waste Management Fee, shall send a written notice to the Generator by U.S. Mail advising the Generator of the amount of the Solid Waste Management Fee. The notice shall be deemed received by the Generator three (3) days after the date of mailing.

Subsection 7 Examination of Records: The District or its duly authorized agent shall have the right to examine records, including access to computer records, maintained by a Hauler. The term "record" shall include, but is not limited to, all accounts of a Hauler. The District shall be allowed access at all reasonable times to inspect and copy at reasonable cost all business records related to a Hauler's collection, transportation, and/or disposal of Mixed Municipal Solid Waste to the extent necessary to ensure that all fees required to be collected or paid have been remitted to the District. Such records shall be maintained by the Hauler for no less than six (6) years.

Subsection 8 Late Payment: A late payment penalty in the amount of one-half a percent (.5%) per month, or the maximum interest rate allowed by law, shall be imposed upon Solid Waste Management Fees collected from the Generator

but not remitted by the Hauler to the District on or before the last day of the month following the collection.

If a Hauler fails to bill and collect the Solid Waste Management Fee from a Generator, the Hauler shall pay the Generator's Solid Waste Management Fee plus the late payment penalty. The late payment penalty shall be calculated from the date the Solid Waste Management Fee should have been billed.

Subsection 9 Collection Actions: Exercise of any remedy under this subsection does not preclude exercise of other remedies.

A. If a Generator fails to pay the Solid Waste Management Fee to a Hauler in a timely manner, the District may use any available legal remedies to collect the overdue, unpaid Solid Waste Management Few from the Generator.

B. If a Hauler has collected Solid Waste Management Fees and failed to remit them to the District in a timely manner, the District may use any available legal remedies to collect the Solid Waste Management Fees from the Hauler.

C. If a Self-Hauler fails to pay the Solid Waste Management Fee to the District in a timely manner, the District may use any available legal remedies to collect the Solid Waste Management Fee from the Self-Hauler.

SECTION 4 VIOLATIONS AND PENALTIES

Subsection 1 Penalty: Any Person who hauls Mixed Municipal Solid Waste and willfully or negligently fails to bill, fails to collect, or fails to pay or remit to the District the Solid Waste Management Fee, or any Generator without Hauler service who fails to pay to the District the Solid Waste Management Fee in the amount determined by the Executive Director of the District, may be imprisoned for not more than 90 days or be required to pay a fine or civil penalty of up to $1,000, or both, for each violation. The amount of the fine or civil penalty shall be determined in the sole discretion of the Executive Director. Written Notice of the penalty or fine shall be mailed to the Person or Generator by U.S. Mail, and shall be deemed to be received by the Person or Generator three (3) days after the date of mailing.

For the purposes of this subsection, a Person who hauls Mixed Municipal Solid Waste for a Generator who subsequently fails to pay its bill has not acted negligently.

This subsection shall not preclude prosecution for any other misdemeanors, gross misdemeanor, or felony under State Minnesota law committed by such Person while hauling Mixed Municipal Solid Waste.

Subsection 2 Injunctive Relief: The District may institute appropriate actions or proceedings, including application for injunctive relief, action to compel performance or other appropriate actions to prevent, restrain, correct or abate any violation or threatened violation of this Ordinance.

Subsection 3 Costs: The District may recover costs, including staff and other related costs, incurred to enforce compliance with the provisions of this Ordinance.

SECTION 5 APPEAL

A. Right of Appeal. Any Person or Generator aggrieved by a decision of the Executive Director in accordance with the provisions of this Ordinance shall have the right to appeal the decision by serving the Executive Director with a request for hearing. The request for hearing must be received by the Executive Director within fifteen (15) days after the Person or Generator receives written notice of the decision. If the Person or Generator fails to request a hearing with the time prescribed, the Person or Generator shall forfeit any right to a public hearing. Upon receipt of a written request for a hearing, the Board shall set a hearing not earlier than ten (10) days and not later than thirty (30) days from the date of receipt of the request.

B. Hearing. Whenever a hearing is requested the hearing shall be governed by the following procedures:

1. The Board shall have the power to conduct public hearings pursuant to this Section. Upon receipt of a request for hearing, the Chairman of the Board shall appoint three members of the Board ("Panel") to conduct the hearing on behalf of the Board. The Panel shall submit to the Board, in writing, findings of fact and recommendations, and the Board may base its decision on this report.

2. Notice of Decision: The Board shall notify the applicant in writing as to its decision within five (5) working days after a decision is reached.

3. Procedure: All hearings shall be conducted in the following manner:

   a. A verbatim transcript of the hearing shall be recorded and transcribed, if necessary.

   b. All testimony shall be sworn under oath.

   c. The rules of evidence shall be informal. All relevant evidence, subject to the Panel's discretion, may be reviewed.

   d. The District shall present evidence first.

   e. The applicant, or its counsel, if represented, may cross-examine all witnesses testifying in the proceedings.

   f. The attorney for the District may cross-examine all witnesses testifying in the proceedings.

   g. The decision of the Board may be based on the evidence presented at the hearing before the Panel and on the findings of fact and recommendations of the Panel.

   h. If the applicant fails to appear at the hearing, it shall forfeit any right to a public hearing before the Board.

   I. Any applicant aggrieved by a decision of the Board shall have the right to appeal to the District Court an questions of law and fact within thirty (30) days of the date of the decision.

SECTION 6 SEVERABILITY

It is hereby declared to be the intention of the Board that the provisions of this Ordinance are separable in accordance with the following:

A. Validity of Provisions: If any court of competent jurisdiction shall rule that any provision of this Ordinance is invalid, other provisions not specifically included in said judgment shall not be affected.

B. Application to Site or Facility: If any court of competent jurisdiction shall rule that the application of any provision of this Ordinance is invalid to a particular Generator, structure, site, facility, operation or Hauler such judgment shall not affect the application of said provision to any other structure, site, facility or operation not specifically included in the judgment.

SECTION 7 PROVISIONS ARE CUMULATIVE

The provisions in this Ordinance are cumulative and are additional limitations upon all other laws and ordinances covering any subject matter in this Ordinance.

SECTION 8 EFFECTIVE DATE

This Ordinance shall be effective March 1, 1996.

SECTION 9 EXPIRATION DATE

This Ordinance shall automatically expire December 31, 1996.

WESTERN LAKE SUPERIOR SANITARY DISTRICT

By: /s/ Joanne Line
Its: Chair

By: /s/ Ronald J. Dvorak
Its: Secretary

2626 COURTLAND STREET / DULUTH,
MINNESOTA 55806-1894 / PHONE
218/722-3336
FAX 218/727-7471
January 22, 1996

Resolution No. 96-2
ESTABLISHING SOLID WASTE MANAGEMENT FEE FOR THE SERVICE AREA LOCATED WITHIN ST. LOUIS COUNTY

WHEREAS, the Sanitary Board of the Western Lake Superior Sanitary District previously established a Solid Waste Management Service Area pursuant to Minnesota Statutes Section 400.08, Subd. 2, for that portion of the Western Lake Superior Sanitary District located within St. Louis County;

WHEREAS, the Board has determined that this service area is in need of solid waste management services from the Western Lake Superior Sanitary District;

WHEREAS, the Board has considered the character, kind and quality of the solid waste management services provided to residents in the service area;

WHEREAS, the Board has also considered all factors that enter into the cost of the solid waste management services provided to residents in the service area;

WHEREAS, the Board finds that the Solid Waste Management Fee should be based on the capacity of the container holding the waste;

WHEREAS, the Board has determined that the Solid Waste Management Fee provided for herein is a just and reasonable amount for the solid waste management services provided by the Western Lake Superior Sanitary District;

NOW, THEREFORE, BE IT RESOLVED, that the Solid Waste Management Fee for the Western Lake Superior Sanitary District service area located within St. Louis County shall be based on solid waste container size according to the schedule set out below and such Solid Waste Management Fee shall be imposed on each occasion waste from the container is collected by a Hauler (as "Hauler" is defined by the District Solid Waste Management Fee Ordinance):

Container Size*	
20 gallons	$ .28
25 gallons	.35
Bag (up to 30 gallons)	.42
32 gallons	.45
35 gallons	.50
40 gallons	.57
45 gallons	.64
64 gallons	.90
65 gallons	.92
96 gallons	1.36

*Each gallon of waste not placed in a container shall be charged at the rate of 1½¢ per gallon.

Fees for the following container sizes are based on the additional factor of whether the waste in the container is compacted or non-compacted:

Container Size	Compacted	Non-Compacted
1 Yard	$ 7.08	$ 1.77
1½ Yards	10.64	2.66
2 Yards	14.16	3.54
3 Yards	21.24	5.31
4 Yards	28.32	7.08
5 Yards	35.40	8.85
6 Yards	42.48	10.62
7 Yards	49.56	12.39
8 Yards	56.64	14.16

BE IT FURTHER RESOLVED, that the Western Lake Superior Sanitary District shall pay to the Hauler four percent (4%) of the total Solid Waste Management Fee collected and remitted to compensate the Hauler for the billing and reporting requirements. Self-Haulers, as defined by the Solid Waste Management Fee Ordinance, shall not be entitled to such payment

BE IT FURTHER RESOLVED, that the effective date of this Solid Waste Management Fee is March 1, 1996.

Dated this 22 day of January, 1996.

WESTERN LAKE SUPERIOR SANITARY DISTRICT

By: Richard F. Holt

Its: Vice Chair

By: Ron Dvorak

Its: Secretary

January 22, 1996

2626 COURTLAND STREET / DULUTH,
MINNESOTA 55806-1894 / PHONE
218/722-3336
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Resolution
No. 96-4

ESTABLISHING 1996 TIPPING FEE

WHEREAS, the Board of the Western Lake Superior Sanitary District adjusts, from time to time, the tipping fee for solid waste disposal at the District Solid Waste Processing Facility and the Rice Lake Industrial Landfill based upon all information available to it;

WHEREAS, the Board of the Western Lake Superior Sanitary District has determined to recover the costs of solid waste services, formerly a part of the tipping fee, through a solid waste management fee system;

NOW, THEREFORE, BE IT RESOLVED, that the tipping fee at the Solid Waste Processing Facility shall be reduced to $39.75 per ton effective March 1, 1996.

BE IT FURTHER RESOLVED, that the tipping fee for disposal at the Rice Lake Industrial Landfill shall be in accordance with the fee schedule established in the 1996 budget.

Dated this 22 day of January, 1996.

WESTERN LAKE SUPERIOR SANITARY DISTRICT

By: Richard F. Holt

Its: Vice Chair

By: Ron Dvorak

Its: Secretary

DISTRICT III
Office of the Clerk
COURT OF APPEALS
110 E. MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Marilyn L. Graves
Clerk

January 29, 1998

To:

Hon. Thomas J. Gallagher
Bayfield County Courthouse
117 East 5th Street
Washburn, WI 54891

Timothy R. Thornton
Jack Y. Perry
Briggs & Morgan, P.C.
2400 IDS Center
Minneapolis, MN 55402

Joan E. Osty, Clerk
Douglas County Courthouse
1313 Belknap Street
Superior, WI 54880

Joseph J. Mihalek
302 W. Superior St., #700
Duluth, MN 55802

Toby E. Marcovich
Marcovich, Cochran & Milliken
1214 Belknap Street
Superior, WI 54880

You are hereby notified that the Court has entered the following opinion and order:

97-1794 Zenith/Kremer Waste Systems, Inc. v. City of Superior (L.C. #96-CV-296)

Before Cane, P.J., Myse and Hoover, JJ.

Upon our review of the parties' briefs and the record, we conclude that this court lacks jurisdiction to review the issues raised on appeal because the trial court's order is not a final order as defined in § 808.03(1), STATS. A final order is one that terminates the entire matter in litigation as to any party. The matter in litigation is determined by examining the pleadings that initiate the action. A judgment terminates the entire matter in litigation only if the trial court intended it to be the last document in the litigation. *See* ***Radoff v. Red Owl Stores, Inc.***, 109 Wis.2d 490, 494, 326 NW.2d 240, 241-42 (1982). Here, the complaint requests certiorari review of the City's decision denying a conditional use permit and requests that the action of the Common Council be reviewed and set aside. The order from which the appeal was taken notes that the record does not clearly state the reasons for the Council's decision and, until the Council makes clear findings of fact setting forth the basis for its denial of the application, the decision cannot be reviewed. Therefore, the circuit court remanded the matter to the Common Council to make specific findings of fact and conclusions of law upon which its decision is based. This order on its face, as well as the trial court's subsequent actions, demonstrate that the court did not complete its certiorari review. The order does not set aside, vacate, reverse or modify the City Council's decision. Rather, the court retained jurisdiction and required the Council to provide an explanation for its decision. That explanation was subject to further review without the filing of a new action for certiorari review.[1]

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[1] We note that this ruling benefits the appellant because, if it were correct that the decision on appeal constitutes a final termination of the certiorari action, it would never be entitled to review of the reasons the City Council gave for denying the permit. If the order on appeal terminated the entire matter in litigation, and no new petition for a writ of certiorari was filed following the Common Council's adoption of findings of fact and conclusions of law, neither the circuit court nor this court could review the City's reasons.

Cases cited by the appellant in support of its argument that a remand order is appealable as a matter of right are distinguishable on their facts. In each of these cases, the circuit court set aside, vacated, modified, or reversed the administrative agency's decision and/or remanded the matter for further reconsideration proceedings. *See, e.g.*, ***Bearns v. DILHR***, 102 Wis.2d 70, 306 N.W.2d 22 (1981); ***Wisconsin Envtl. Decade v. Public Serv. Comm'n***, 79 Wis.2d 409, 256 N.W.2d 149 (1977). The remand in these cases allowed the agency to change its decision and, if necessary, hold an additional evidentiary hearing. A party aggrieved by the new decision would have to commence a new action to seek further review. Here, the trial court ordered the City to explain its existing decision to permit review by the circuit court without the necessity of commencing a new action. Under these circumstances, the entire matter put in litigation by the request for certiorari review was not terminated by the order for remand.

While the circuit court could have set aside the City's decision because it provided no rationale, it did not do so. Rather, it chose to postpone a decision on the existing action until the City stated a basis for its decision. Therefore, the order for remand did not terminate the matter in litigation and this court lacks jurisdiction to review the nonfinal order delaying resolution of the certiorari review pending the City's action.

Upon the foregoing reasons,

IT IS ORDERED that this appeal is dismissed.

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ST. LOUIS SIXTH JUDICIAL DISTRICT
CASE TYPE: Other Civil

Zenith/Kremer Waste Systems, Inc. and United Waste Systems, Inc.,

Court File No.: C8-96-600188

Plaintiffs,

vs. **AFFIDAVIT OF SCOTT HONER**

Western Lake Superior Sanitary District,

Defendant.

STATE OF MINNESOTA)
) ss.
COUNTY OF ST. LOUIS)

AFFIANT, Scott Honer, being duly sworn under oath, states:

1. I was the President of Zenith/Kremer Waste Systems, Inc. from December 31, 1992 through August of 1995. I am currently the Divisional Manager for Zenith/Kremer Waste Systems, Inc.

2. Since the condemnation of the Rice Lake Landfill in approximately 1979 and until 1982, I believe that WLSSD required all of the District Waste collected for disposal to be disposed of at WLSSD's own proprietary landfill. In 1982 the

construction of the Garbage Burner was completed. Since then WLSSD has designated that this waste be disposed of at the Garbage Burner. At times when the Garbage Burner was not operating or unable to accept waste, WLSSD required District Waste to be delivered to other disposal facilities designated by WLSSD. Since approximately 1993 WLSSD has directed waste to an unlined out-of-state landfill.

3. At all times, there have been and are significantly less expensive waste disposal alternatives to the Garbage Burner. In 1994, for example, while the Incinerator was imposing a tipping fee of $70.25 per ton, out-of-state competitors were willing to accept District Waste for $25 to $30 per ton. Zenith/Kremer was thus forced in 1994 to pay a tipping fee to WLSSD which was greater than $40 per ton over the available market rate. Zenith/Kremer could have used the less expensive competing disposal facilities if WLSSD had not required Zenith/Kremer to deliver the District Waste it collected for disposal to facilities owned by WLSSD.

4. District Waste is very susceptible to exportation for disposal. The City of Superior (Wisconsin) Sanitary Landfill is just across the bay and in 1994 it offered a tipping fee of approximately $44 per ton. There are accessible out-of-state landfills offering tipping fees of less than $30 per ton. Furthermore, Zenith/Kremer's parent company, United Waste Systems, Inc., owns a sanitary landfill in Michigan's Upper Peninsula which also offers a competitive tipping fee of approximately $40-45 per ton. Thus, but for WLSSD's continued enforcement of waste designation, the entire District Waste stream collected by Zenith/Kremer would be exported to these competing out-of-state disposal facilities.

5. Based on Zenith/Kremer's collections alone, approximately 26,000 tons of District Waste could be exported annually but for WLSSD's waste designation. At disposal, transfer and hauling fee of on average $35 to $55 per ton, Zenith/Kremer and its customers together with the interstate market have lost up to $1 million annually. The burden has fallen on the customers, out-of-state landfill, the waste hauling business, generally and the waste transfer stations, including Zenith/Kremer's.

6. Shortly after United's acquisition of Zenith/Kremer, Zenith/Kremer informed WLSSD that unless the Garbage Burner offered a competitive tipping fee it would be forced to export for disposal to United's Landfill all of the District Waste it collects.

7. By filing its designation lawsuit against WLSSD, Zenith/Kremer made it clear that, unless there was a significant tipping fee reduction at WLSSD's Garbage Burner, once designation was defeated all of the District Waste collected by Zenith/Kremer, together with its tipping fee revenue, would be disposed of out-of-state.

8. With a tipping fee of $39.75 per ton, few, if any, out-of-District or out-of-state landfills, including United's Ontonagon, Michigan landfill, can successfully compete against the Garbage Burner for the receipt of District Waste,

9. The remittance to haulers for the administration and collection cost of the Solid Waste Management Fee only equates to approximately $60,000 annually.

FURTHER Affiant sayeth not.

/s/
SCOTT HONER

Subscribed and sworn to before
me this 8 day of March, 1996.

/s/ Lynn M. Stoyanoff

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ST. LOUIS SIXTH JUDICIAL DISTRICT
CASE TYPE: Other Civil

Zenith/Kremer Waste Systems, Inc. and United Waste Systems, Inc.,

Court File No.: C8-96-600188

Plaintiffs,

vs. **SECOND AFFIDAVIT OF SCOTT HONER**

Western Lake Superior Sanitary District,

Defendant.

STATE OF MINNESOTA)
) ss.
COUNTY OF ST. LOUIS)

AFFIANT, Scott Honer, being duly sworn under oath, states:

1. I was the President of Zenith/Kremer Waste Systems, Inc. from December 31, 1992 through August of 1995. I am currently the Divisional Manager for Zenith/Kremer Waste Systems, Inc.

2. Following Judge Doty's March 29, 1996 Orders, Plaintiffs do not believe that there is any viability to WLSSD's designation scheme. WLSSD's continued enforcement of

designation no longer dictates where Plaintiffs dispose of the District Waste they collect for disposal.

3. In contrast, the constitutionality of waste management service fees is still an open question and it is, therefore, dictating Plaintiffs' disposal practices. There is, in fact, a split of authority in Minnesota regarding the constitutionality of waste management service fees. The split of authority is highly significant here. But for the uncertainty surrounding the constitutionality of WLSSD's service fee scheme, Plaintiffs would be exporting for disposal some or all of the District Waste they collect.

4. At WLSSD's pre-service fee disposal charge of $63/ton, Plaintiffs have a number of significantly less expensive out-of-state disposal alternatives, including their own Ontonagon, Michigan landfill. Some of the competing out-of-state landfills, *i.e.* Superior (Wis.) Sanitary Landfill, are sufficiently close to be directly hauled to by the collection trucks; other more distant landfills, *i.e.* Plaintiffs' Ontonagon, Michigan landfill, require a local waste transfer facility and the use of long-haul vehicles. Both of these alternative involve significant capital expenditure and business disruption. Plaintiffs understandably wish to avoid such costs until WLSSD's fee scheme is dispositively ruled upon. In fact, until WLSSD's fee scheme is struck as unconstitutional, Plaintiffs' exportation of District Waste would be at a competitive disadvantage.

FURTHER Affiant sayeth not.

/s/
SCOTT HONER

Subscribed and sworn to before
me this 11th day of June, 1996.

/s/ Lynn M. Stoyanoff
Notary Public